

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILLIAM E. DUNCAN,

Plaintiff,

v.

JOSEPH LEHMAN,

Defendant.

Case No. C04-5633RBL

REPORT AND
RECOMMENDATION

**NOTED FOR:
JUNE 2nd, 2006**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is Defendant's motion for summary judgment. (Dkt. # 32). Plaintiff, through counsel, has responded. (Dkt. # 33 through 36). Defendant has replied. (Dkt. # 37).

STANDARD

Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a

1 rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio
 2 Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative
 3 evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (e). Conversely, a
 4 genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed
 5 factual dispute, requiring a judge or jury to resolve the differing versions of the truth. Anderson v.
 6 Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific Electrical
 7 Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

8 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct
 9 complained of was committed by a person acting under color of state law and that (2) the conduct
 10 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United
 11 States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams,
 12 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if
 13 both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), cert.
 14 denied, 478 U.S. 1020 (1986).

15 FACTS

16 A. Undisputed facts.

17 Plaintiff having been convicted of communicating with a minor for an immoral purpose and
 18 indecent exposure sentenced an became an inmate housed in the Washington state correctional system.
 19 Because of the nature of plaintiff’s conviction he was not eligible for a reduction of his sentence by
 20 earned time or good time in the normal manner. Instead, pursuant to RCW 9.94A 728 (2) plaintiff
 21 became eligible for possible release on community custody placement “in lieu of earned release time.”
 22 To be eligible for community placement an inmate must obtain the Department of Corrections approval
 23 of a release plan. The parties agree that plaintiff became eligible for release to community custody
 24 January 3, 2003. (Dkt. # 33, page 6, Dkt. # 32, page 2). Plaintiff’s sentence expired April 4th, 2004.
 25 Plaintiff was released to deputy sheriffs for civil commitment proceedings on April 1st, 2004, only three
 26 days before his sentence expired.

27 Plaintiff submitted a proposed plan for release to the Boylston Hotel in November of 2002. That

1 plan was rejected by the Department in February of 2003 because it placed Mr. Duncan in close
2 proximity to a school. Plaintiff concedes he is not challenging the denial of that release plan. (Dkt. # 33,
3 page 11 footnote 3). The record reflects a second plan being formulated for release to the Franklin Hotel.
4 (Dkt. # 32 and 33 through 36).

5 B. Contested facts.

6 Plaintiff alleges he submitted a second plan for release in March or April of 2003. (Dkt. # 33,
7 Page 7). This time he proposed release to the Franklin Hotel. Defendant contests plaintiff's assertions
8 that the plan was submitted before December of 2003. Plaintiff states he asked two counselors, first Mr.
9 Johnson and, after he was transferred to McNeil Island, Mr. Lewandosky, to submit the plan to reside at
10 the Franklin. Neither of these persons are named defendants in this action and both deny plaintiff
11 submitted the Franklin plan to them. (Dkt. # 32-4, declarations of Johnson and Lewandowsky). The
12 record shows plaintiff submitting the plan to reside at the Franklin to a third counselor, Mr. Jackson in
13 December of 2003. (Dkt. # 36-4).

14 Plaintiff contends that pursuant to a policy he was denied the ability to submit an address for
15 release because he was a sex offender being referred for civil commitment and he contends the policy
16 denied him due process of law. In support of his position he submits a copy of a memo signed by the
17 Assistant Deputy Secretary of the Washington State Department of Corrections signed February 12,
18 2003. (Dkt. # 35-7 memo from Anne Fiala to OCO management).

19 The memo says that the state court has told the department that an inmate must be permitted to
20 submit a plan for investigation. The memo states that Policy 350.200 will be updated. If an inmate has
21 been referred for civil commitment as a sexually violent predator or is found by the End of Sentence
22 Review Committee to "appear to meet definition of a sexually violent predator, the CCO must", as part of
23 the investigation, review certain documents and if a forensic psychological report has not been done the
24 CCO will "pend [sic]" the investigation until a forensic psychological report is available for review.
25 Only after all information is reviewed may a plan be accepted or denied. (Dkt. # 35-7, page 2).

26 Neither party submits a copy of DOC policy 350.200 showing that the policy was ever updated.
27 The copy of the policy submitted by both sides is the one effective June 25th, 2002. (Dkt. # 32-3 and 35-

6).

There is evidence in the record showing that in December of 2003 Mr. Jackson referred plaintiff's plan for release to the Franklin to a Risk Management Specialist, Mrs. Farr. (Dkt. # 36-5). A December 24th, 2003 memo from Mrs. Farr to plaintiff indicates that "Because you are special, there is another step in your process for release. It is because you need to be evaluated before you can be released and we never know when that will happen." (Dkt. 36-8). The memorandum goes on to indicate family members should not spend money reserving a room at that point in time and that release to the Franklin would be part of the transition plan.

Two subsequent memorandum from Mrs. Farr show plaintiff's plan, including the address to the Franklin had been accepted and was under consideration or pending. The two memorandum state that no decision would be made until the plan was cleared by the End of Sentence Review Committee and a forensic psychological evaluation had been conducted. (Dkt. # 36-9 and 36-10).

DISCUSSION

The only named defendant in this action is Joseph Lehman, former Secretary of the Department of Corrections. Defendant argues:

1. Plaintiff has no entitlement to release prior to expiration of his sentence.
2. Plaintiff has no liberty interest in early release.
3. Plaintiff has failed to show personal participation by defendant Lehman.
4. Plaintiff's claims are barred by the Eleventh Amendment.
5. The Defendant is entitled to qualified immunity.

(Dkt. # 32, page 2).

The court today does not consider this case as a case of first impression. In C04-5825RBL, Kistenmacher v Lehman, the court found no liberty interest in release prior to the expiration of a sentence for inmates like plaintiff who received community custody "in lieu of" earned early release. The court stated:

Washington State's complex sentencing system allows some inmates to earn time off their sentence by programing and good behavior while incarcerated. Other inmates, like Mr. Kistenmacher, may not earn time off their sentences but instead may become

1 eligible for placement in a community under supervision in lieu of earning good time or
2 earned time.

3 RCW 9.94A.728 (2) provides:

4 No person serving a sentence imposed pursuant to this chapter and committed to the
5 custody of the department shall leave the confines of the correctional facility or be
6 released prior to the expiration of the sentence except as follows:

7 ...

8 (2)(a) A person convicted of a sex offense or an offense categorized as a serious violent
9 offense, assault in the second degree, vehicular homicide, vehicular assault, assault of a
10 child in the second degree, any crime against persons where it is determined in
11 accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a
12 deadly weapon at the time of commission, or any felony offense under chapter 69.50 or
13 69.52 RCW, committed before July 1, 2000, may become eligible, in accordance with a
14 program developed by the department, for transfer to community custody status in lieu of
15 earned release time pursuant to subsection (1) of this section;

16 (b) A person convicted of a sex offense, a violent offense, any crime against persons
17 under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW,
18 committed on or after July 1, 2000, may become eligible, in accordance with a program
19 developed by the department, for transfer to community custody status in lieu of earned
20 release time pursuant to subsection (1) of this section;

21 (c) The department shall, as a part of its program for release to the community in lieu of
22 earned release, require the offender to propose a release plan that includes an approved
23 residence and living arrangement. All offenders with community placement or
24 community custody terms eligible for release to community custody status in lieu of
25 earned release shall provide an approved residence and living arrangement prior to
26 release to the community;

27 (d) The department may deny transfer to community custody status in lieu of earned
28 release time pursuant to subsection (1) of this section if the department determines an
offender's release plan, including proposed residence location and living arrangements,
may violate the conditions of the sentence or conditions of supervision, place the
offender at risk to violate the conditions of the sentence, place the offender at risk to
reoffend, or present a risk to victim safety or community safety. The department's
authority under this section is independent of any court-ordered condition of sentence or
statutory provision regarding conditions for community custody or community
placement;

When an inmate is first transferred to the Department of Corrections, staff at the
Department calculates at least three possible release dates for the inmate. The first of
these dates is the maximum release date. A maximum release date is the date an inmate
will be released because they have served the entire sentence imposed. The second date
is an earned early release date, ERD. This is the date an inmate may be released if they
earn all available sentence reductions and do not lose earned time for misbehavior.
Release on this date is not automatic for all inmates. The third date the department
calculates is an adjusted release date. This is the projected date when an inmate may be
eligible for release if they lose no further good time or earned time. This date along with
the earned early release date changes when an inmate does not earn or loses a possible
reduction in their sentence. By statute an inmate cannot receive earned early release

1 credits before they have been earned. "The correctional agency shall not credit the
2 offender with earned release credits in advance of the offender actually earning the
credits." See, RCW 9.94A.728 (1).

3 Certain classes of inmates have periods of supervision at the end of their
4 incarceration. These inmates are not allowed to earn earned early release because of the
5 nature of their crime. These inmates receive supervision by way of community
6 placement or community custody "in lieu of" earned early release. Plaintiff is a person
7 whose Judgment and Sentence included community placement or community custody
8 following release. Defendants contends plaintiff were not entitled to general release on
his earned early release date. Plaintiff has not come forward with any evidence to
contradict this assertion. Thus, this action deals with an inmate who reached his earned
early release date and was not released on that date because community custody or
community placement was imposed in the Judgment and Sentence.

9 Plaintiff's position is identical to Mr. Kistenmachers. The court in Kistenmacher analyzed the
10 due process claim and held:

11 The court begins by noting that an inmate has no constitutional right to release
12 before expiration of the sentence. Greenholtz v. Inmates of Nebraska, 442 U.S. 1
13 (1979). Nor have the Washington state appellate courts recognized an independent
14 state created interest in amassing early release credits. In Re Galvez, 79 Wash. App.
15 655 (1995). This does not end the court's analysis because in this case the court is not
concerned with the granting or denial of earned early release time. Under the facts of
this case the plaintiff had been granted the credits or time off his sentence and was
eligible for release, subject to the approval of the release plan by the Department of
Corrections and whatever public notification may be mandated by state law.

16 There are two questions this court must answer. The first question is whether
17 the Due Process Clause of the 14th Amendment requires a hearing prior to denial of a
18 release plan and the second question is whether the law was clearly established that
such a hearing was required.

19 The court cannot overemphasize that the interest at issue in this case must be
20 a state created liberty interest and is not an interest found under the 14th Amendment
Due Process Clause itself. Normally the court would first determine whether there is
21 in fact a state created liberty interest. The Washington State Court of Appeals found
22 there to be a "limited liberty interest" in Crowder, but the court did not define what a
"limited liberty interest" is and approved post deprivation remedies which only
included the Department helping Mr. Crowder to obtain release. In Re Crowder, 97
Wash App. 598 (1999). No hearing of any type was ordered.

23 In Dutcher the same court emphasized it was operating under the State Rule
24 of Appellate Procedure 16.4 which did not require a finding of a constitutional
violation and only required a finding of unlawful restraint under state law. Dutcher
25 114 Wash. App. at FN 3 and 4; Citing In Re Cashaw, 123 Wash. 2d 138 (1994).
26 Cashaw specifically rejected the contention that procedural rules which are not
outcome determinative create a liberty interest protected by Due Process. In Re
27 Cashaw, 123 Wn 2d. at 146. In Cashaw the Washington State Supreme Court
required the Indeterminate Sentence Review Board to follow its own rules and
granted relief using the State Rule of Appellate Procedure 16.4. This grant of relief

1 was not based on a finding of any constitutional violation.

2 The Washington State Supreme Court in Cashaw was careful to grant relief
 3 only on state grounds. Indeed, the State Supreme Court in Cashaw analyzed what is
 4 needed to find a state created liberty interest and found no due process violation in
 5 that case. The State Supreme Court's analysis in Cashaw is instructive regarding
 6 what constitutes a liberty interest and when such interests rise to the level of a state
 7 created liberty interest protected by the Due Process Clause of the United States
 8 Constitution. This court adopts the analysis set forth by the Washington State
 9 Supreme Court. The court stated:

10 Liberty interests may arise from either of two sources, the due process
 11 clause and state laws. Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct.
 12 864, 868, 74 L.Ed.2d 675 (1983); Toussaint v. McCarthy, 801 F.2d
 13 1080, 1089 (9th Cir.1986), cert. denied, 481 U.S. 1069, 107 S.Ct.
 14 2462, 95 L.Ed.2d 871 (1987). The due process clause of the federal
 15 constitution does not, of its own force, create a liberty interest under
 16 the facts of this case for it is well settled that an inmate does not have
 17 a liberty interest in being released prior to serving the full maximum
 18 sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional
 19 Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979);
 20 Ayers, 105 Wash.2d at 164-66, 713 P.2d 88; Powell, 117 Wash.2d at
 21 202-03, 814 P.2d 635.

22 However, as indicated above, state statutes or regulations can create
 23 due process liberty interests where none would have otherwise existed.
 24 See Hewitt, 459 U.S. at 469, 103 S.Ct. at 870; Toussaint, 801 F.2d at
 25 1089; Powell, 117 Wash.2d at 202-03, 814 P.2d 635. By enacting a
 26 law that places substantive limits on official decisionmaking, the State
 27 can create an expectation that the law will be followed, and this
 28 expectation can rise to the level of a protected liberty interest. See
Toussaint, 801 F.2d at 1094.

For a state law to create a liberty interest, it must contain "substantive
 predicates" to the exercise of discretion and "**specific directives to the
 decisionmaker that if the regulations' substantive predicates are
 present, a particular outcome must follow**". Kentucky Dep't of
 Corrections v. Thompson, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910,
 104 L.Ed.2d 506 (1989); Swenson v. Trickey, 995 F.2d 132, 134 (8th
 Cir.), cert. denied, 510 U.S. 999, 114 S.Ct. 568, 126 L.Ed.2d 468
 (1993). **Thus, laws that dictate particular decisions given
 particular facts can create liberty interests, but laws granting a
 significant degree of discretion cannot.**

23 In Re Cashaw, 123 Wn 2d at 144 (emphasis added).

24 The Department has been mandated by statute to implement a system that
 25 allows for the possibility of early release. For some persons the release is automatic
 26 when they reach their earned early release date because they have no supervision
 27 following incarceration. Inmates like Mr. Kistenmacher, facing community placement
 28 or community custody, can earn a potential reduction in sentence and be placed on
 community placement or community custody at the discretion of the Department of
 Corrections.

1 The parties may disagree whether the discretion of the Department is
 2 unfettered or restricted with regards to what the department may consider but such
 3 argument misses the point. RCW 9.94A.728(2)(d) grants the Department the ability
 4 and the discretion to deny a release plan for any person who would receive
 5 community custody if the Department determines the plan may violate conditions of a
 6 sentence or supervision, may place the offender at risk to reoffend, or presents a risk
 7 to victim or community safety. Thus, whatever limits have been placed on the
 8 Department are not outcome determinative and there is no state created liberty
 9 interest. The Department still has a significant degree of discretion in granting or
 10 denying release to community placement or community custody. As the statute itself
 11 notes “[t]he department's authority under this section is independent of any court-ordered
 12 condition of sentence or statutory provision regarding conditions for community custody
 13 or community placement.” (Dkt. # 25, Exhibit 3, page 3, RCW 9.94A.728 (2)(d)).

14 A careful reading of the Washington State Court of Appeals holding in
 15 Dutcher shows the court was acting pursuant to state Rule of Appellate Procedure
 16 16.4 and was using the lesser standard of review which did not require a finding of a
 17 constitutional violation. The ruling in Dutcher that the Department must follow the
 18 state statutory system and consider plans on the merits does not equate to a finding of
 19 a state created liberty interest in release and the holding in Dutcher did not eliminate
 20 the Departments discretion.

21 There has been a progression in the State Court of Appeals decisions in which
 22 their terminology and reasoning was expanding. In Crowder the court found only a
 23 “limited liberty interest.” In Re Crowder, 97 Wash. App. 598 (1999). In Dutcher,
 24 the court used the reasoning of Cashaw to grant relief solely on state grounds but
 25 inaccurately stated the interest was a “limited but protected liberty interest.” Dutcher,
 26 114 Wash. App. at 758. Now, in a more recent case, the same court is citing Cashaw
 27 and Dutcher for the proposition that there is a limited liberty interest protected by due
 28 process. In Re Liptrap, 127 Wash. App. 463, 469 (2005). To the extent that
 29 Liptrap, finds a state created liberty interest in release credits for persons subject to
 30 community custody the cases cited do not support the proposition and the court
 31 declines to follow this decision. A potential for release based on the Department
 32 exercising its discretion does not equate to an absolute interest in release that a person
 33 with earned time and no post release supervision enjoys.

34 As noted above neither Crowder nor Dutcher found a state created liberty
 35 interest. Under the analysis set forth in Cashaw there is no federally protected interest
 36 in this case. The holding of Dutcher is that an agency follow its own rules and
 37 statutes. While in some cases that may become outcome determinative and raise to
 38 the level of a state created liberty interest it is not outcome determinative in this case
 39 because of the amount of discretion left with the Department.

40 There is not a state created liberty interest at stake in this case. The statutes
 41 creating the potential of community custody do not set forth any mandate that the
 42 Department hold hearings and only mandate the Department consider properly
 43 submitted release plans for persons who have reached their possible earned early
 44 release date subject to community custody or community placement after release.
 45 Accordingly the defendant’s motion for summary judgment should be **GRANTED**.

46 This court concurs with the reasoning and holding in Kistenmacher. The facts of this case very
 47 only slightly form Mr. Kistemachers case. In this case the Department accepted plaintiff’s plan but

1 would not render a decision until a forensic psychological report had been completed. Neither party has
2 addressed whether the Department had the authority to demand such a report, however, the statute in
3 question indicates the Department may deny a plan if release represents “a risk to victim safety or
4 community safety.” Further the statute indicates the Departments authority in this area is “independent
5 of any court-ordered condition of sentence or statutory provision regarding conditions for community
6 custody or community placement.” RCW 9.94A.728(2)(d).

7 There is no entitlement to release prior to expiration of the sentence for persons with community
8 custody requirements,. Further, there is no liberty interest requiring due process. The requirement that
9 an agency follow its own rules or accept a plan for consideration is a creature of state law as noted by the
10 Washington State Supreme Court in Cashaw. In Re Cashaw, 123 Wn 2d at 144.

11 Defendant is entitled to Summary Judgement. The court need not consider the remaining
12 arguments or reach the issue of immunity.

13 CONCLUSION

14 For the reasons outlined above the undersigned recommends **GRANTING** defendant’s
15 motion for summary judgment. A proposed order accompanies this Report and Recommendation.

16 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
17 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R.
18 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.
19 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is
20 directed to set the matter for consideration on **June 2nd, 2006**, as noted in the caption.

21
22 DATED this 9th day of May, 2006.

23 /S/ J. Kelley Arnold
24 J. Kelly Arnold
25 United States Magistrate Judge
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